BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re the Matter of	)	
	)	
Reevaluation of the Comparative	)	
Standards for Noncommercial	)	MM Docket 95-31
Educational Applicants	)	
	)	

TO: The Commission

OPPOSITION TO PETTION FOR RECONSIDERATION

1. Jack I. Gartner ("Gartner"), by his attorney and pursuant to Section 1.429(f) of the Commission's rules, submits his Opposition to the Petition for Reconsideration submitted by Black Hawk College ("Black Hawk") on June 16, 2003.[1] Gartner is an applicant for a construction permit for a new noncommercial television station on Channel 30 at Davenport, Iowa. His application is mutually exclusive with Black Hawks application. In support, the following is respectfully submitted:

2. Black Hawk seeks reconsideration of the Commission's decision[2] to return as unacceptable for filing any construction permit application submitted during an open filing window by a noncommercial applicant proposing a noncommercial station that is mutually exclusive with any application for the allotment. The Commission also decided that any currently pending application for a noncommercial educational station that is mutually exclusive

[1] Notice of Black Hawk's Petition appeared in the Federal Register on July 8, 2003. Thus, the instant Opposition is timely. See Section 1.4(b)(1) of the Commission's rules and Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding, Report No. 2614, released July 1, 2003.

[2] See the Commission's Second Report and Order, MM Docket 95-31, Reevaluation of the Comparative Standards for Noncommercial Educational Applicants.

with an application(s) for a commercial station would be returned as unacceptable for filing, regardless of how long the noncommercial application has been pending.

3. Black Hawk argues that the Commission's decision will result in the dismissal of Black Hawk's application with prejudice, despite Black Hawk's "good faith" filing and year long prosecution of the application under the Commission's rules in effect of the time of its filing (1996) until adoption of the Order. Black Hawk further argues that the Commission's action violates Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). It also contends that the Commission's decision is impermissibly retroactive, and is arbitrary and capricious.

4. It is well established that "the filing of an application creates no vested right to a hearing," Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989), citing United States v. Storer Broadcasting, 351 U.S. 192, 197 (1956), and that "the Commission has wide latitude to change its policies through rulemaking 'as long as it provides a reasoned explanation for doing so.'" DIRECTV v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997), citing, Committee for Effective Cellular Rules, 53 F.3.d 1309, 1317 (D.C. Cir. 1995). See also Florida Cellular Mobil Communications Corp. v. FCC, 28 F.3d 191, 196-97 (D.C. Cir. 1994), cert. denied, 514 U.S. 1016 (1995) (affirming change in the processing rules as a reasoned response to Commission experience).

5. Here the Commission faced a dilemma not of its own making. Congress prohibited non-commercial applicants from participating in the auction of broadcast licenses. See Balanced Budget Act of 1997. Black Hawk had no vested right in the manner in which the Commission makes licensing determinations. See U.S. v. Storer, supra.

6. The Court has repeatedly recognized that "an agency may properly consider the avoidance of litigation-related delay when revising its rules." Omnipoint Corp. v. FCC, 78 F.3d

620, 632 (D.C. Cir. 1996); see also PLMRS Narrowband Corp. v. FCC, 182 F.3d 995, 1000 (D.C. Cir. 1999); Florida Cellular Mobil, 28 F.3d at 196-98 (D.C. Cir. 1994); Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413, 1435-37 (D.C. Circ 1983). As noted above, the Commission does not have statutory authority to use auctions to resolve such proceedings, and Black Hawk does not claim otherwise. The Commission ultimately concluded that the most equitable and efficient approach in those cases was to limit the participation to only commercial applicants where the facility in question is a commercial allocation.

7. The Commission declined to expend the administrative resources necessary to revise and defend comparative standards. Instead, it endeavored to resolve the matter as quickly as possible and in a manner that was fairest to all of the parties. Lacking statutory authority to use auctions, the Commission decided to limit applications for commercial facilities to commercial applicants in the same manner that non-commercial facilities are limited to only non-commercial applicants. The Commission's decision is not violative of Ashbacker. There is no disparity between the treatment of commercial and non-commercial entities.

The Commission Decision Is Not Impermissibly Retroactive

8. The Commission's decision is not primarily retroactive as defined by the Supreme Court in Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994), because it does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Black Hawk's right to have its application for broadcast license fairly evaluated in accordance with the processing rules in effect when the license is awarded is not abridged because those processing rules have changed in ways it did not anticipate when it filed its applications. The Supreme Court recognized the

"new rules may abolish or modify pre-existing interests" and that the Commission may make "retroactive adjustments, provided they are reasonable." United States v. Midwest Video Corp., 406 U.S. 649, 673-74 n.31 (1972), quoting General Telephone Co. of Southwest v. United States, 449 F.2d 846, 863-64 (5th Cir. 1971).

9. In DIRECTV v. FCC, 110 F.3d 816, 826 (D.C. Cir. 1997) the Court rejected a claim very similar to Black Hawk's. There, the Commission had initially proposed to distribute pro rata to certain preexisting permittees any reclaimed Direct Broadcasting Satellite channels. In anticipation of receiving the additional channels, the petitioners said they had spent millions building satellites with transponders to accommodate those additional channels. But the Commission ultimately abandoned its distribution plan and decided to auction the reclaimed channels instead. The decision was not retroactive under Landgraf, the Court held, because the former plan to distribute the reclaimed channels was entirely prospective even though "the petitioners may reasonably have expected that, under the [former distribution plan], they would receive a pro rata portion of any channels the Commission may reclaim." 110 F.3d at 825-26. Nor did the millions reasonably spent in reliance on the discarded distribution plan "violat[e] a separate legal standard." Id. at 826. Rather, the rules were sustainable because the Commission had not acted arbitrarily and capriciously in abandoning the pro rata methodology in favor of competitive bidding. Id., citing Bell Atlantic Telephone Cos. V. FCC, 79 F.3d 1195, 1207 (D.C. Cir. 1996). See also PLMRS Narrowband, 192 F.3d at 1000-01 (rejecting similar claims by pending applicants where FCC changed policy from lottery to auction).

10. It has been clear since United States v. Storer Broadcasting, 351 U.S. 192 (1956), however, that, even in the absence of intervening legislation, the Commission has the authority to amend its processing rules and to apply those changed processing rules to pending

applications even if such action results in the dismissal of a pending application. Quite simply, persons seeking a communications license have no reason to expect that the processing rules will remain unchanged.

Due Process

11. The Commission's decision does not violate any due process rights. In Multi-State Communications, Inc. v. FCC, 728 F.2d 1519, 1525 (1984), a decision not mentioned by Black Hawk, held that "[f]ederal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution." Multi-State involved legislation requiring the Commission to issue a license to any existing television licensee who volunteered to move to New Jersey. When the licensee of a New York City television station volunteered to move its station, the Commission granted its contested renewal application and dismissed the competing application filed by Multi-State. The legislative provision did not exceed Congress' lawful power, the Court reasoned, because there was only a statutory, not a constitutional, right to a comparative hearing. That the Commission's dismissal of Multi-State's competing application had frustrated its expectation of a hearing was not a basis for the finding of a constitutional violation because "the Commission merely effectuated congressional intent." 728 F.2d at 1525.

12. In Orion Communications Limited v. FCC, No. 98-1424, July 13, 2000, the Court held as follows:

> "Because precedent in this circuit clearly established that the filing of an application does not create a vested right, see e.g. Chadmoore Communications, Inc. v. FCC, 113 F.3d 235, 241 (D.C. Cir. 1997), there is no impermissible retroactivity. The only issue therefore is whether the FCC's decision to hold auctions in place of comparative hearings was arbitrary or capricious. Based on the perceived difficulty of developing new criteria and the inevitable litigation about that new criteria, the FCC concluded that "auctions will result in a more

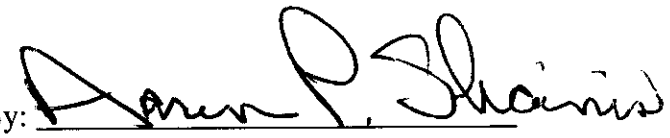
> expeditious resolution of each particular case, thereby expediting the initiation of new broadcast service to the public. We found nothing either arbitrary or capricious in this judgment."

Similarly, the Commission's instant decision is also neither arbitrary as capricious for the same reasons articulated by the Court in the Orion decision.

In view of the foregoing, Black Hawk's Petition for Reconsideration should be denied.

Respectfully submitted,

JACK I. GARTNER

By: 

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Dated: July 23, 2003

CERTIFICATE OF SERVICE

I, Karen McNeill, a secretary in the law firm of Shainis & Peltzman, Chartered, do hereby certify that I have on this 23rd day of July, 2003, caused to be mailed by first class mail, postage prepaid, copies of the foregoing Opposition to Petition for Reconsideration to the following:

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